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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 701

UNITED STATES, PETITIONER

v.

HENRY ERICSSON COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on October 1, 1945.

OPINION BELOW

The opinion of the Court of Claims (R. 54–59) has not been officially reported.

JURISDICTION

The judgment of the Court of Claims was entered on October 1, 1945 (R. 60). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether under the standard form of Government construction contract the Government is liable to the building contractor for delay caused by it in the course of the performance of the contract where the contractor completed performance within the period specified by his contract as extended by change orders agreed to by him.

2. Whether, if the Government is so liable, the court below was correct in assessing as damages

(a) a percentage of the contractor's general office overhead, despite a finding that, with a minor exception ($193.17), "it is not proved that general office overhead was actually increased by reason of the delays" (Fdgs. 29, 26, 30; R. 43, 40, 44); and

(b) one-half the rental value of respondent's equipment rendered idle by the delay, despite a finding that "there is no evidence of any other planned use of this equipment by [respondent] during that period" (Fdg. 27 (a); R. 40–41).

STATEMENT

Respondent, a construction contractor with its principal office in Chicago, Illinois (Fdg. 1; R. 28), on September 3, 1936, entered into a contract with the United States, acting through the Federal Emergency Administrator of Public Works, to construct 17 apartment buildings in the Julia C. Lathrop Homes in Chicago, at the contract

price of $2,097,600 (Fdgs. 2, 3; R. 28–29). The work was to be completed within 365 days from the date of the notice to proceed (Fdg. 2; R. 28). During the progress of the work, change orders were issued which altered the contract requirements and extended the time for completion 74 days (Fdg. 2; R. 28). The change orders were agreed to by respondent and each contained the following clause:

> This Change Order expressly satisfies any and all claims against the United States of America and the United States Housing Authority of whatever nature or purpose incidental to or as a consequence of the change herein described (Fdg. 43; R. 53).

The job was completed within the time as extended and respondent was paid the full price specified in the contract as adjusted by the change orders (Fdg. 2; R. 28).

Thereafter, on February 14, 1939, respondent brought this suit in the Court of Claims (R. 1–27), alleging, *inter alia,* that it had suffered increased costs due to petitioner's (1) failure to furnish respondent with certain full-size detail drawings immediately after ordering respondent to proceed with the work, as required by the contract (R. 2); (2) delay in approving certain shop drawings, as required by the contract (R. 2–3); and (3) delay in furnishing steam, as required by the

contract, to enable respondent to test the heating system installed by it (R. 1–2).

The Court of Claims found that respondent's planned sequence of doing the work was disrupted by petitioner and that "at least 47 days of delay in completion of the entire job is attributable to the delay of the [Government] in furnishing full size detail drawings * * * and its failure * * * to secure approval of shop drawings in the absence of full size drawings" (Fdgs. 14, 13; R. 34–35). The court found that an additional "delay of 17 days in the ultimate completion of the entire job" resulted from the failure of respondent "to receive steam when ready to test the heating system" (Fdg. 23; R. 38), due to petitioner's failure to make prompt arrangements with the utility company for electric service (Fdg. 20; R. 37). The court held that these delays constituted breaches of contract (R. 57).[1]

The court below entered judgment for respondent for $42,306.34 (R. 54, 59–60), said sum comprising all the "costs" found by the court to have been incurred by respondent because of delays caused by petitioner (Fdgs. 25–30, 33–36, 42; R.

[1] The court below also found that in other respects, not here material, the respondent's performance had also been delayed (Fdgs. 16, 21, 24; R. 35–38), but, since such delays were concurrent with those relating either to the full-size drawings, approval of the shop drawings, or the furnishing of steam for testing, that they "did not result in any delay in the ultimate completion of the entire job" (Fdgs. 24, 16, 21; R. 38, 36, 37).

39–49, 53). Such "costs" included $1645, representing half the rental value of certain items of equipment owned by respondent which "it was obliged to keep on the job 47 calendar days longer than would have been required had such delays not occurred" (Fdgs. 27 (a), 42; R. 40, 53); and $11,433.60, representing the portion of the respondent's general office overhead which the court found allocable to the Lathrop job and to the 64 days' delay (Fdgs. 29–30, 42; R. 42–44, 53).[2]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding the Government liable to the contractor for delays in the ultimate completion of the job although the contractor completed performance within the period specified by the contract as extended by change orders agreed to by him.

2. In failing to follow the decision of this Court in *United States* v. *Blair,* 321 U. S. 730, and its own prior decision in *Leo Sanders* v. *United*

[2] The court below also found the following "costs" to have been incurred by respondent as the result of such delays: (1) the cost of additional form lumber which respondent was obliged to purchase (Fdgs. 25, 42; R. 39, 53); (2) certain "field costs" incurred by respondent during the 64-day delay (Fdgs. 26, 28, 42; R. 39–41); (3) additional rental payments incurred by respondent on four hoist engines rented by it (Fdgs. 27 (b), 42; R. 41, 53); and (4) the cost of "temporary heating" necessitated by the fact that the 64-day delay carried the work into the cold season (Fdgs. 33–36, 42; R. 45–49, 53).

States, C. Cls. No. 45469, decided May 7, 1945, with respect to liability for such delays.

3. In allowing recovery by the contractor of a percentage of general office overhead as damages for such delays, in the absence of evidence to show that, "except for the salary of an office clerk," "general office overhead was actually increased by reason of the delays" (Fdg. 29; R. 43).

4. In holding that a contractor with the Government, delayed by the Government in performance of the contract, is entitled to recover such percentage of its general office overhead during the period of delay which the "field cost" of the Government job involved bears to the "field cost" of all jobs carried on by the contractor during the period of the Government contract (Fdgs. 30, 42; R. 43–44, 53).

5. In allowing the respondent half the rental value of its equipment which "it was obliged to keep on the job 47 calendar days longer than would have been required" but for the delays, in the absence of "evidence of any other planned use of this equipment by [respondent] during that period" (Fdgs. 27 (a), 42; R. 40–41, 53).

6. In entering judgment for respondent.

REASONS FOR GRANTING THE WRIT

It is submitted that the court below was in error both in (1) finding, in the circumstances presented, that the Government was liable for having delayed

completion of respondent's contract, and (2) assessing, in the circumstances presented, general office overhead costs and the rental value of idle equipment as part of the damages for such delay.

1. In *United States* v. *Blair,* 321 U. S. 730, this Court held the Government not liable for delay when the contractor was able to finish his work, despite the delay, within the original stipulated time. See also *United States* v. *Rice,* 317 U. S. 61; *Crook Co.* v. *United States,* 270 U. S. 4. In the instant case, respondent, despite the Government's delays, completed its contract within the period specified by that contract as modified by change orders agreed to by respondent (Fdgs. 2, 43; R. 28, 53). Here, the Government was more directly at fault than in the *Blair* case, since its liability is rested upon its own tardiness rather than, as in the *Blair* case, that of another contractor. But this would not appear to affect the principle of the *Blair* case. Moreover, it would appear to be immaterial, from the standpoint of the application of that principle, whether the contractor whose work was delayed by the Government completed his work by the date originally agreed upon by the parties as the completion date or by the date subsequently agreed upon by the parties as the completion date.[3] While the Court of Claims

[3] We do not argue that the *Blair* doctrine would be applicable were the change orders issued by the Government arbitrarily for the purpose of extending the completion time and thus absolving the Government from liability for delay.

has itself applied the rule of the *Blair* case to the situation presented by the instant case—where the contractor completed his work by the date specified in change orders (*Leo Sanders* v. *United States*, C. Cls. No. 45469, decided May 7, 1945), it has more recently abandoned that position, both in a baseless attempt (R. 58–59) to distinguish the instant case from the *Sanders* case on their facts and in its more recent decision in *B-W Construction Company* v. *United States*, C. Cls. No. 43915, decided November 5, 1945, which, on facts similar to those of the instant case, it decided in accord with the instant case without even attempting to distinguish the *Sanders* case.[4] The result has been to overrule the *Sanders* case for all practical purposes and to indicate a refusal by the court below further to apply the principle enunciated by this Court in the *Blair* case with respect to liability for delay.

2. In awarding the respondent that portion of its general office overhead found by the court below to be allocable to the Lathrop job, the court followed its common practice of automatically allowing contractors whose work was delayed by the Government to recover as damages for such delay a proportionate share of central office overhead based upon a rule of thumb and without proof that such overhead was in fact increased by

[4] The United States is also applying for certiorari in the *B-W Construction Company* case.

the delay.[5] Indeed, in the instant case the court below expressly found that, "except for the salary of an office clerk," amounting to $193.17 and allowed by the court below as a part of respondent's increased field costs for 47 days of the delay (Fdgs. 26, 42; R. 40, 53), "it is not proved that general office overhead was actually increased by reason of the delays" (Fdg. 29; R. 43). Nor did respondent "forego any other business on account of such delays" (*id.*). It is submitted that the holding of the court below, in respect of allowing general office overhead as an element of damages for delay in the absence of proof of actual damage, assesses a penalty for breach of contract, is devoid of legal basis, and should be set aside.

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[5] The rule of thumb has varied. While in the instant case the court employed a ratio of the "field cost" of the Lathrop job to the "field cost" of all jobs done by the respondent during the period of work on the Lathrop project (Fdg. 30; R. 43–44), it has, in other cases employed ratios based on the contractor's collections (*Struck Construction Company* v. *United States*, 96 C. Cls. 186), on direct labor costs (*Young Engineering Co., Ltd.* v. *United States*, 98 C. Cls. 310), on construction costs (*Brand Investment Company* v. *United States*, 102 C. Cls. 40, certiorari denied, 324 U. S. 850), and on the contractor's "monthly gross" (*B-W Construction Company* v. *United States*, C. Cls. No. 43915, decided November 5, 1945). When unable to decide what ratio to employ, the court below has made an award for central office overhead based upon "all the facts and circumstances." *Irwin & Leighton* v. *United States*, 101 C. Cls. 455, 481. Cf. *Gulf States Creosoting Co.* v. *Loving*, 120 F. 2d 195, 203–204 (C. C. A. 4); *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.*, 116 F. 2d 823, 839 (C. C. A. 6).

3. Equally divorced from any showing of actual loss was the award to respondent for its equipment kept at the construction site during the period of delay (Fdgs. 27 (a), 42; R. 40, 53). The court below expressly found that there was "no evidence of any other planned use of this equipment" by respondent during the period in question (Fdg. 27 (a); R. 41). Nevertheless, the court computed damages on a daily "reasonable rental value" for each piece of equipment, multiplied by the number of days of delay (Fdg. 27 (a); R. 40). The result was halved because of the absence of wear and tear on the idle equipment (Fdg. 27 (a); R. 40, 57). The decision of the court below permitting recovery of such rental value in the circumstances of this case conflicts in principle with the decision of the Circuit Court of Appeals for the Fourth Circuit in *Gulf States Creosoting Co.* v. *Loving,* 120 F. 2d 195, 204–205. Cf. *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F. 2d 823, 837–839 (C. C. A. 6). The decision nevertheless is in accord with the practice of the court below since, in *Brand Investment Company* v. *United States,* 102 C. Cls. 40, certiorari denied, 324 U. S. 850, it overruled *Phoenix Bridge Company* v. *United States,* 85 C. Cls. 603. The *Phoenix* case had correctly stated the rule, applicable to construction contract cases, as requiring a showing, before equipment rental could be assessed as damages for delay, that the delay com-

plained of caused "actual damages" in that it prevented the removal and use of the equipment on other work. *Ibid.* 631. It is submitted that the policy of the court below, as applied to this case, of awarding to respondent the discounted rental value of equipment at the construction site during the period of the delay is likewise improper and should be reversed.

4. The questions presented are important. The large number of construction contracts entered into by the United States will continue to present questions of liability for delay. The result of the court's refusal to follow its own decision in the *Sanders* case, *supra,* which, in turn, followed the decision of this Court in the *Blair* case, *supra,* is to leave the interpretation of the standard Government construction contract, insofar as the Government's liability for delay is concerned, in considerable confusion. An authoritative ruling by this Court as to the applicability of the principle of the *Blair* case to cases where the contract has been completed within the time of completion as required by change orders, is desirable. Should the principle of the *Blair* case be held inapplicable to that situation, it is also important that the Court of Claims be directed to award those damages only that reflect the actual loss resulting from the breach and that such an award of damages may not include penalty amounts unsupported by proof and fixed by varying rules of thumb.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

DECEMBER 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 701.

UNITED STATES, *Petitioner*,

v.

HENRY ERICSSON COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENT IN OPPOSITION.

HERMAN J. GALLOWAY,
Attorney for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The opinion of the Court of Claims (R. 54-59), has not been officially reported.

Jurisdiction.

The judgment of the Court of Claims was entered on October 1, 1945 (R. 60). Petitioner invokes the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925, as amended.

Questions Presented.

1. Whether a construction contractor's acceptance of change orders extending the time relieves the Government of liability for its own inexcusable delays merely because the contractor completes the project within the extended time, despite the fact that the change orders did not substantially delay the job, had no relation to the Government's inexcusable delays, and were not intended by either party to compromise or waive any claims arising from such inexcusable delays.

2. Whether damages for the Government's delays properly include a proportionate share of the contractor's general office expense for the period of such delays.

3. Whether, in order to recover the rental value of its equipment rendered idle by the Government's delays, the contractor must prove some other planned use for the equipment during the period of such delays.

Statement.

Respondent, a construction contractor, on September 3, 1936, entered into a contract with the United States, acting through the Federal Emergency Administration of Public Works, to construct 17 apartment buildings in the Julia Lathrop Homes, in Chicago, for $2,097,600.00, the work to be completed within 365 days after receipt of notice to proceed. Notice to proceed was received September 23, 1936, thereby fixing September 22, 1937, as the contract completion date (Fdgs. 1, 2, and 3; R. 28-29).

The contract required the contracting officer to furnish detail drawings where necessary (Fdg. 8; R. 31). Among these were the detail drawings for stone trim (Fdg. 11, R. 32). The contract required the contractor to submit shop drawings for the stone trim, to be approved by petitioner (Fdgs. 9 and 10; R. 32). To prepare such shop drawings respondent first had to have the detail drawings (Fdg. 11, R. 32). Petitioner failed to furnish detail drawings for the

stone trim in the ordinary and usual course (Fdg. 12; R. 33). To minimize such delay, respondent prepared shop drawings in the absence of such detail drawings and submitted them for approval. Petitioner failed to approve these shop drawings in the ordinary and usual course and would approve none of them until after it had finally given detail drawings to respondent (Fdg. 13; R. 34-35). Due to petitioner's delay in furnishing detail drawings for the stone trim, and to its failure to cooperate in respondent's efforts to secure approval of shop drawings in the absence of such detail drawings, completion of the entire job was delayed at least 47 days (Fdg. 14; R. 35).

The specifications provided for steam tests of the heating system when it had been completed, the steam to be furnished by petitioner (Fdgs. 17 and 18; R. 36). Article 6 of the contract provided that all tests by the government should be performed in such manner as not to unnecessarily delay the work (R. 8). The contract work could not be completed until after the steam tests had been made and approved (Fdg. 23; R. 38). Respondent was ready to make such tests on September 13, 1937, and so notified petitioner, but the latter did not furnish steam until October 13, 1937, 3 weeks after the contract completion date (Fdgs. 19 and 20; R. 37). Due to such delay, completion of the entire job was delayed an additional 17 days (Fdg. 23; R. 38).

The court below held that petitioner's delays in furnishing detail drawings and in furnishing steam constituted breaches of contract (R. 55-57).

Petitioner issued certain change orders under the contract, extending the time for completion 74 days. Respondent has been paid the contract price as adjusted by such change orders (Fdg. 1; R. 28). Some of these change orders involved new and different work and one merely extended the time because of a strike. There was no relation between these change orders and the delays which the court below held were breaches of contract. The changes covered by these orders did not delay completion of the work by 74

days or any other substantial period of time (R. 58). These change orders were agreed to by respondent without protest, each one containing the following clause:

> "This Change Order expressly satisfies any and all claims against the United States of America and the United States Housing Authority of whatever nature or purpose incidental to or as a consequence of the change herein described (Fdg. 43; R. 53)."

In agreeing to the change orders neither party intended that any disputes arising under the contract, and not relating to the subject matter of the change orders, should be compromised or waived by the granting or accepting of the change orders (Fdg. 43; R. 53-54). The job was completed within the contract time as thus extended, being accepted by petitioner as of December 3, 1937 (Fdgs. 2, 35 and 36; R. 28, 47, 49).

The court below entered judgment for respondent for $42,306.34, on account of defendant's delays (R. 54, 59 and 60). Included in this sum was $11,433.60, being the share of home office overhead allocable to this job for the period of the delays upon the basis of job costs (Fdgs. 29-30; R. 42-44).

Also included as damages was $1,645.00, being one-half of the reasonable rental value of certain items of respondent's equipment which it was obliged to keep on the job 47 days longer than would otherwise have been necessary had petitioner not delayed the work. The full reasonable rental value was reduced by one-half because of the absence of wear and tear on the equipment during the delay (Fdg. 27(a); R. 40; R. 57).

Reasons for Denying the Writ.

1. *United States* v. *Blair*, 321 U. S. 730, does not hold, as petitioner intimates, that the Government escapes liability for its own delays if the contractor completes within the original contract time. That case merely held that unless

the contract indicates such an intention, the Government was not obligated to compel one Government contractor to complete ahead of his contract time in order to enable another contractor to complete in advance of his completion date. Neither do *United States* v. *Rice*, 317 U. S. 61, and *Crook Co.* v. *United States*, 270 U. S. 4, support petitioner's position. In each of those cases, as in the Blair case, the delay was due to another Government contractor's operations, upon which, as the plaintiff knew when he executed his contract, his own operations depended.

Moreover, petitioner's interpretation would lead to absurd results. Suppose, for example, that at the outset of a contract the Government suspended performance for a month for no reason whatsoever. According to petitioner, it would be liable for damages for its delay if the contractor completed a month or more after the contract completion date, but would not be liable if the contractor completed within the contract time. Respondent cannot believe that this Court would ever lay down such a rule, rewarding the inefficient contractor and penalizing the diligent. Further, such an interpretation would, in the long run, operate against the Government's own best interests. If it should become established that the Government is entitled to needlessly protract the time of performance this contingency would necessarily be reflected in the prices received in future bids.

Even if petitioner's interpretation were correct as to contracts completed within the original contract time, there would be no reason to extend it to the present case. Here the contract was not completed until long after the contract time because of delays which petitioner now admits were its own fault. Respondent did complete the job within the time as extended by certain change orders. But the subject matter of these change orders did not substantially delay the work, and had no relation whatsoever to the delays which were held to be breaches of contract. The change orders relinquished only those "claims * * * incidental to

or as a consequence of the change herein described." The court below has found that neither party intended that the granting or acceptance of these change orders should compromise or waive any dispute arising under the contract and not relating to the subject matter of the changes. Respondent is therefore at a loss to understand why petitioner now contends that these change orders had an effect which the parties never intended. The record shows that petitioner issued the change orders for causes which did not substantially delay the work, ignoring the real delays. If it had been petitioner's intention that such change orders should waive all claims for delay, it would then appear that they were issued arbitrarily for the purpose of extending the completion time and thus absolving the Government from liability for its delays. Petitioner itself does not argue that it would escape liability under such circumstances (See footnote 3, page 7 of Petition).

2. The court below was correct in assessing as damages a proportionate share of general office overhead for the period of the delay. Petitioner emphasizes the fact that, with one exception, it was not shown that its delay caused an increase in the central office overhead. This is probably true in every case involving delay. General overhead is, in a large measure, made up of continuing items, which naturally do not vary depending on any particular job. While they are of such a nature that they cannot practicably be charged directly to any particular job, they must be borne by all of them. It is standard accounting practice to attribute home office expense to various company operations on some fair basis. Thus, it is only just, that when the Government delays a job it should be held liable for a proportionate share of the home office overhead for the period of the delay. A long line of cases has held that the Government is so liable. *Largura Construction Co.* v. *United States*, 88 C. Cls. 531, 542, 547; *Herbert M. Baruch Corp. Ltd.* v. *United States*, 93 C. Cls. 107, 126; *Struck Construction Co.* v. *United States*, 96 C. Cls. 186, 225; *Young*

Engineering Co. v. *United States,* 98 C. Cls. 310, 324. The Government presented the question to this Court in a petition to review the judgment of the Court of Claims in the case of *Brand Investment Company* v. *United States,* 102 C. Cls. 40. That petition advanced every argument against allowing a proportionate part of general office overhead that has been made in the present petition. The petition was denied. *United States* v. *Brand Investment Company,* 324 U. S. 850.

3. The court below was correct in holding that respondent did not have to show other planned use of its equipment in order to recover the rental value for the period it was rendered idle by petitioner's delay. As in most cases of delay, the contractor had no way of determining when the delay would end and could not remove the equipment from the job, and thus was in no position to plan any other use for the equipment. The decision of the Court below does not as petitioner urges, conflict in principle with *Gulf States Creosoting Co.* v. *Loving* (C.C.A. Fourth Circuit), 120 F. 2d, 195, or with *Grand Trunk Western R. Co.* v. *H. W. Nelson Co.,* 116 F. 2d 823 (C.C.A. 6). Neither of those cases held that proof of other planned use for equipment was essential to recovery of its rental value. The Government presented the question to this Court in a petition to review the judgment of the Court of Claims in *Brand Investment Company* v. *United States, supra.* That petition advanced all the arguments with respect to equipment rental, including the supposed conflict between that case and *Gulf States Creosoting Co.* v. *Loving, supra,* and *Grand Trunk Western R. Co.* v. *H. W. Nelson Co., supra,* that have been made in the present petition. The petition was denied. *United States* v. *Brand Investment Company, supra.*

4. The denial of certiorari in the *Brand Investment Company* case, *supra,* shows, as to two of the questions raised in the present petition, that there is no conflict with any decision of this Court or of any federal court, and that

such questions are not of sufficient importance to require review by this Court. The third question raised in this petition, i.e., the effect of the change orders, does not appear to be of any greater importance. Petitioner does not claim that the decision below upon this question is in conflict with those of other federal courts. It has been shown that such decision is not in conflict with those of this Court. Moreover, it has been above shown that all of the questions were correctly decided by the court below.

Conclusion.

For the reasons stated above, it is respectfully submitted that this petition for a writ of certiorari should be denied.

HERMAN J. GALLOWAY,
Attorney for Respondent.